Pearce was involved in the murder of a teenage boy and the attempted murder of a second after the teenagers failed to purchase drugs that Pearce ordered them to buy for him. After holding the boys hostage, and forcing one of them to perform oral sex on him, Pearce and three friends drove the two boys to a remote location, where Pearce ordered one of the boys out of the truck and ordered one of his friends to "'break [the boy's] jaw'" or "'pop him in the jaw. . . .'" *Id.* at 566. Pearce's accomplice instead shot the boy and announced (though mistakenly) to Pearce that he had killed him. Pearce then drove the truck another 200 yards and ordered the second boy out of the car, at which point one of Pearce's accomplices shot and killed the second boy. Although he did not expressly order his accomplice to kill the second boy, Pearce was the instigator of a crime in which killing was an essential component. In light of the murderous shooting of the first boy just moments earlier, Pearce's ordering the second boy out of the truck could have been viewed by the jury as nothing less than an order to kill.

No comparable evidence was presented to the jury in Mr. Van Poyck's case. Although Mr. Van Poyck and Valdes were both heavily armed when they attempted to carry out the escape, killing was in no way an essential component or purpose of the plan, nor did the State present any evidence either that Mr. Van Poyck planned, or knew in advance that Valdes intended, to kill anyone during the course of the felony. Instead, the State relied entirely on inconclusive eye-witness testimony that, as the Florida Supreme Court held in *Van Poyck I*, was insufficient as a matter of law to prove that Mr. Van Poyck was the triggerman. In short – with Mr. Van Poyck's conviction for premeditated murder having been overturned, and no legitimate evidentiary proof in the record that he actually killed anyone – Mr. Van Poyck's death

sentence now stands alone as a disturbing exception among Florida's current death-row population.

In affirming the trial court's denial of Mr. Van Poyck's request for DNA testing, the Florida Supreme Court ruled out the possibility that the jury in Petitioner's case would have recommended a life sentence even if the jury had known to a scientific certainty that – contrary to the State's contention at trial – Mr. Van Poyck was *not* the triggerman. *Van Poyck v. State*, 908 So. 2d 326 (Fla. 2005) ("*Van Poyck II*"). The State has not disputed Petitioner's contention that the results of the requested DNA testing could conclusively prove (by demonstrating the absence of the victim's blood from Mr. Van Poyck's clothing) that Mr. Van Poyck did not kill anyone; nor did the Florida Supreme Court question the evidentiary significance of the requested DNA testing in this regard. Instead, the Court simply declared, based on its own sense of the record, that there was no "reasonable probability that Van Poyck would have received a lesser sentence" regardless of whether he actually fired the fatal shots. *Id.* at 329.

In dismissing the importance of the DNA evidence sought by Mr. Van Poyck, the court failed to cite any empirical basis whatsoever for its factual conclusion. As discussed above, however, the court's supposition that Mr. Van Poyck's non-triggerman status would have made no difference clashes directly with the evidence supplied by Florida's actual death-row population: namely, that Florida juries generally do not recommend, and Florida trial courts do not impose, death sentences on defendants who did not themselves either kill or murderously direct or plan a killing. If triggerman status in felony murder cases were in fact inconsequential to prosecutors who sought the death penalty and jurors who

recommended it, there surely would be more non-triggermen on Florida's death row.

Certainly, there can be no serious dispute that conclusive scientific proof that Mr. Van Poyck did not himself kill anyone would have constituted powerful mitigating evidence in the jury's sentencing deliberations. *Cf. Zerquera v. State*, 549 So. 2d. 189, 193 (Fla. 1989). Moreover, in addition to the evidence cited above, other available empirical evidence strongly supports the conclusion that jurors' support for the death penalty materially diminishes when the defendant is proved to have been an indirect accomplice in the killing that gave rise to a capital offense. *See, e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1566 (1998) ("[S]upport for the death penalty in public opinion polls drops from 70-76% when respondents are asked whether or not they support the death penalty in the abstract to 25-29% when they are asked whether they support the death penalty for a defendant who was '[o]nly an accomplice to the killing.'"). The jury verdict form in Mr. Van Poyck's case demonstrates that as many as eleven jurors believed that Mr. Van Poyck was the triggerman, and therefore may have relied on that belief in deciding to recommend a death sentence. *See* Petitioner's Appendix at F-1. The Florida Supreme Court's failure to acknowledge the potentially decisive importance of this belief in the jury's ultimate sentencing recommendation was arbitrary and capricious and cries out for correction by this Court.

This failure was particularly egregious because definitive DNA evidence exonerating Mr. Van Poyck of the triggerman role would have essentially knocked out a key pillar of the State's penalty-phase argument to the jury. During the penalty

phase hearing in Petitioner's case, only Mr. Van Poyck's own self-interested testimony was offered to counter the State's contention that Mr. Van Poyck was in fact the triggerman. The identity of the triggerman was the centerpiece of the prosecutor's argument for the death penalty: "'So again, it is important who the trigger man is. There is no doubt about it. It's important to your deliberations, okay.'" *See Van Poyck II*, 908 So.2d at 331. As the dissenting opinion below observed, "[T]here can be no doubt that the prosecution, in seeking the death penalty asserted to the jury first, that it was important in their deliberations on the penalty to determine who the triggerman was, and, second, in this case, the evidence supported a determination that the defendant was the triggerman." *Id.* at 331 (Anstead, J., dissenting).

Further compounding this error was the court's refusal to consider the cumulative impact of such DNA evidence in conjunction with the other extensive mitigating evidence that Mr. Van Poyck's trial counsel failed to discover and present at his original penalty-phase hearing. The "reasonable probability" test under Florida Rule of Criminal Procedure 3.853(c)(5)(C) is the same as that required to demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), and should be construed as incorporating that constitutional standard. Mr. Van Poyck's initial collateral attack on his sentence alleging constitutionally ineffective assistance of penalty-phase counsel sharply divided the Florida Supreme Court and came within a single vote of prevailing. *See Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997).[5] This close decision was not based on counsel's failure

5. Although a majority of the court held that Mr. Van Poyck's counsel was not ineffective for failing to obtain and present DNA evidence at the guilt phase, *see id.* at 697, it made no such ruling (Cont'd)

to obtain DNA evidence for the penalty phase, but rather was the result of trial counsel's "blatant lack of investigation and preparation" in failing to discover and present an abundance of mitigating evidence concerning Mr. Van Poyck's mental health and other personal history. The impact of scientifically conclusive DNA evidence proving Mr. Van Poyck's innocence of actual killing must be weighed together with the other severe deficiencies in the mitigation case that were presented to the jury. In that context, there clearly exists a "reasonable probability" that the addition of exculpatory DNA evidence at the penalty phase would have led to a sentence of life, not death. The Florida Supreme Court's analysis totally ignored that consideration.

In short, the Florida Supreme Court's rejection of Petitioner's request for DNA testing was based on mere arbitrary speculation at odds with what we know about capital juries and sentences. In reality, there is a compelling basis to believe that DNA evidence absolving Mr. Van Poyck of the triggerman role could, and likely would, have dramatically transformed the dynamics of the penalty phase hearing and the jury's sentencing deliberations in this case. Reversal of the Florida Supreme Court's arbitrary result is essential to vindicate Mr. Van Poyck's well-established constitutional right to present *to a jury* the substantial mitigating scientific proof that he was not the triggerman, *see, e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugart*, 481 U.S.

(Cont'd)

with regard to the prejudicial impact of failing to introduce this evidence at the penalty-phase. The tactical justification cited by the court for counsel's decision not to introduce DNA testing evidence at the guilt phase had no application at the penalty phase, at which DNA evidence demonstrating that Mr. Van Poyck was not the triggerman could only have helped him in the eyes of the jury.

393 (1987), and to preserve the fundamental constitutional requirement that the jury be allowed to "consider and give effect to [Petitioner's mitigating] evidence in imposing sentence," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The Florida Supreme Court's fundamental failure to properly assess the potentially decisive impact of DNA-based proof on Mr. Van Poyck's sentence represents a constitutional error that plainly warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A:

FLORIDA DEATH ROW INMATES WITH FELONY MURDER CONVICTIONS WHO PHYSICALLY CAUSED A VICTIM'S DEATH

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
Barwick, Darryl	*Barwick v. State*, 660 So.2d 685, 689 (Fla. 1995) (defendant fatally stabbed victim after raping her in the course of a robbery).	Yes
Bradley, Donald	*Bradley v. State*, 787 So.2d 732, 735-36 (Fla. 2001) (defendant beat victim to death with a "war stick" in the course of a burglary).	Yes
Branch, Eric	*Branch v. State*, 685 So.2d 1250, 1252 (Fla. 1997) (defendant beat, stomped, sexually assaulted and strangled victim in the course of stealing her car).	Yes
Caballero, Luis	*Caballero v. State*, 851 So.2d 655, 659 (Fla. 2003) (defendant "covered [the victim's] mouth to muffle her screams [and] pulled her head [while his accomplice] pulled [a] cord" around her neck to strangle her in the course of robbing her).	Yes
Carroll, Elmer	*Carroll v. State*, 815 So.2d 601, 607 (Fla. 2002) (defendant raped and fatally strangled a ten-year-old girl).	Yes
Clark, Ronald	*Clark v. State*, 613 So.2d 412, 413 (Fla. 1993) (defendant shot victim "seven or eight times" in the course of an armed robbery).	Yes
Cummings-El, F. W.	*Cummings-El v. State*, 863 So.2d 246, 248 (Fla. 2003) (defendant fatally stabbed his ex-girlfriend in the course of an armed burglary).	Yes
Davis, Toney	*Davis v. State*, 703 So.2d 1055, 1056-57 (Fla. 1998) (defendant fatally injured a two-year-old girl in the course of molesting her).	Yes

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
Doorbal, Noel	*Doorbal v. State*, 837 So.2d 940, 949 & n.21 (Fla. 2003) (defendant killed one victim in the course of an elaborate criminal enterprise through one of the following means, "an overdose of horse tranquilizer; asphyxia for strangulation . . . ; or blunt force trauma to [the victim's] skull"; defendant killed a second victim by repeatedly injecting her with horse tranquilizer).	Yes
Farr, Victor	*Farr v. State*, 621 So.2d 1368, 1369 (during an attempted kidnapping, defendant crashed the victim's car into a tree, thereby killing her).	Yes
Fennie, Alfred	*Fennie v. State*, 855 So.2d 597, 600 (Fla. 2003) (defendant fatally shot victim in the back of her head in the course of an armed robbery and kidnapping).	Yes
Floyd, Maurice	*Floyd v. State*, 850 So.2d 383, 387-89, 401-02 (Fla. 2003) (defendant was convicted of fatally shooting his mother-in-law during the course of a robbery; the Florida Supreme Court reversed his convictions for felony murder and robbery, finding that the jury charge was insufficient to support the robbery conviction, but affirmed defendant's death sentence based on his first-degree premeditated murder conviction).	Yes
Garcia, Henry	*Garcia v. State*, 644 So.2d 59, 60-62 (Fla. 1994) (defendant stabbed two elderly sisters while burglarizing their home).	Yes
Gaskin, Louis	*Gaskin v. State*, 591 So.2d 917, 918 (Fla. 1991) (defendant fatally shot a husband and wife in the course of burglarizing their home).	Yes
Geralds, Mark	*Geralds v. State*, 601 So.2d 1157, 1158 (Fla. 1992) (defendant beat and stabbed victim to death in the course of burglarizing her home).	Yes
Gorby, Olen	*Gorby v. State*, 819 So.2d 664, 671 (Fla. 2002) (defendant fatally beat in victim's head in the course of a burglary).	Yes

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
Gore, Marshall	*Gore v. State*, 784 So.2d 418, 423, 427 (Fla. 2001) (defendant fatally stabbed and strangled victim in the course of an armed robbery).	Yes
Green, Crosley	*Green v. State*, 641 So.2d 391, 393 (Fla. 1994) (defendant fatally shot victim in the course of armed robbery and kidnapping).	Yes
Griffin, Michael	*Griffin v. State*, 639 So.2d 966, 967 (Fla. 1994) (defendant fatally shot a pursuing police officer after burglarizing a hotel room).	Yes
Hartley, Kenneth	*Hartley v. State*, 686 So.2d 1316, 1318-19 (Fla. 1996) (defendant "left [his] trade mark" by shooting the victim in the head in the course of an armed robbery).	Yes
Hendrix, Robert	*Hendrix v. State*, 908 So.2d 413, 416 (Fla. 2005) (defendant fatally "shot, bludgeoned, and stabbed" his former accomplice and his former accomplice's wife after an armed burglary to prevent them from testifying against him).	Yes
Hunter, James	*Hunter v. State*, 817 So.2d 786, 789 (Fla. 2002) (defendant fatally shot three men "in turn" in the course of an armed robbery).	Yes
Hurst, Timothy	*Hurst v. State*, 819 So.2d 689, 692-93 (Fla. 2002) (defendant stabbed victim to death in the course of robbing a restaurant).	Yes

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
James, Edward	*James v. State*, 695 So.2d 1229, 1230-31 (Fla. 1997) (defendant raped and strangled an eight-year-old girl and immediately thereafter raped and stabbed her grandmother).	Yes
Jones, Christopher	Appellant's Initial Br., *Jones v. State*, 2005 WL 3451308 at *4-6 (Fla. Nov. 2005) (an eyewitness testified that defendant hit the victim in the head with a gun and then shot the victim in the chest in the course of a robbery).	Yes[1]
Jones, David	*Jones v. State*, 748 So.2d 1012, 1016 (Fla. 2000) (defendant strangled victim to death in the course of a robbery and kidnapping).	Yes
Knight, Ronald	*Knight v. State*, 770 So.2d 663, 664 (Fla. 2000) (defendant fatally shot victim in the course of a kidnapping).	Yes
Kopsho, William	Appellant's Initial Br., *Kopsho v. State*, 2005 WL 3626062 at *8 (Fla. Nov. 14, 2005) (defendant fatally shot his wife while attempting to kidnap her).	Yes[2]
Kormondy, Johnny	*Kormondy v. State*, 845 So.2d 41, 45 (Fla. 2003) (defendant fatally shot victim in the head in the course of an armed burglary).	Yes
Lukehart, Andrew	*Lukehart v. State*, 776 So.2d 906, 910-11, 922 (Fla. 2001) (defendant fatally hit infant in the head in the course of committing aggravated child abuse).	Yes

1 Case is still subject to direct review by the Florida Supreme Court.

2 Case is still subject to direct review by the Florida Supreme Court.

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
Mahn, Jason	*Mahn v. State*, 714 So.2d 391. 393-94 (Fla. 1998) (defendant stabbed his father's live-in girlfriend and her son to death in the course of an armed robbery).	Yes
Marshall, Matthew	*Marshall v. State*, 604 So. 2d 799, 802 (Fla. 1992) (defendant beat a fellow inmate to death while attempting to collect gambling winnings).	Yes
Melton, Antonio	*Melton v. State*, 638 So.2d 927, 929 (Fla. 1994) (defendant "fired the fatal shot" in the course of robbing a pawn shop).	Yes
Mendoza, Marbel	*Mendoza v. State*, 700 So.2d 670, 672 (Fla. 1997) (defendant fatally shot victim in the course of an attempted robbery).	Yes
Miller, David	*Miller v. State*, 770 So.2d 1144, 1146-47 (Fla. 2000) (defendant beat a homeless man to death with a pipe in the course of an attempted robbery).	Yes
Morrison, Raymond	*Morrison v. State*, 818 So.2d 432, 437-39 (Fla. 2002) (defendant fatally stabbed victim in the course of an armed robbery).	Yes
Nelson, Micah	*Nelson v. State*, 850 So.2d 514, 518 (Fla. 2003) (defendant, in the course of kidnapping, robbing, and sexually assaulting the victim, killed the victim by "attempt[ing] to strangle her with his bare hands, empt[ying] the contents of a fire extinguisher into her mouth, and forc[ing] a tire iron into her mouth and through the back of her head").	Yes
Orme, Roderick	*Orme v. State*, 896 So.2d 725, 729 (Fla. 2005) (defendant strangled victim to death in the course of raping and robbing her).	Yes
Pardo, Manuel	*Pardo v. State*, 563 So.2d 77, 78 & n.1 (Fla. 1990) (defendant "intentionally killed" nine victims in five separate episodes "for pecuniary gain").	Yes

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
Reese, John	*Reese v. State*, 694 So.2d 678, 680 (Fla. 1997) (defendant strangled victim to death in course of a sexual battery and burglary).	Yes
Rodriguez, Juan	*Rodriguez v. State*, --- So.2d ----, 2006 WL 1243475 at *1 (Fla. Jan 19, 2006) (defendant fatally shot victim four times in the course of a robbery).	Yes
Rodriguez, Manolo	*Rodriguez v. State*, 753 So.2d 29, 34 (Fla. 2000) (defendant fatally shot two victims in the course of an armed robbery).	Yes
Rogers, Glen	*Rogers v. State*, 783 So.2d 980, 985-86 (Fla. 2001) (defendant stabbed victim to death in the course of an armed robbery).	Yes
Sims, Merit	*Sims v. State*, 681 So.2d 1112, 1113 (Fla. 1996) (defendant fatally shot a police officer in the course of an armed robbery).	Yes
Suggs, Ernest	*Suggs v. State*, 644 So.2d 64, 65-66 (Fla. 1994) (defendant stabbed victim to death in the course of a kidnapping).	Yes
Taylor, Perry	*Taylor v. State*, 583 So.2d 323, 325 & n.2 (Fla. 1994) (defendant beat and choked victim to death "in the commission of a sexual battery").	Yes
Trease, Robert	*Trease v. State*, 768 So.2d 1050, 1052 (Fla. 2000) (defendant fatally slit victim's throat in the course of an armed robbery).	Yes
Walls, Frank	*Walls v. State*, 641 So.2d 381, 385 (Fla. 1994) (defendant fatally shot two victims in the course of burglarizing their home).	Yes

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?
Watson, Kenneth	*Watson v. State*, 651 So.2d 1159, 1160 (Fla. 1995) (defendant fatally stabbed victim in the course of an armed burglary).	Yes
Whitton, Gary	*Whitton v. State*, 649 So.2d 861, 863-64 (Fla. 1995) (defendant fatally stabbed victim in the course of a robbery).	Yes
Willacy, Chadwick	*Willacy v. State*, 696 So.2d 693, 694-95 (Fla. 1997) (defendant "doused [his] victim with gasoline and set her on fire" "in the course of a robbery, arson, and burglary").	Yes
Zack, Michael	*Zack v. State*, 911 So.2d 1190, 1195-96 (Fla. 2005) (defendant stabbed victim to death in the course of a "nine-day crime spree" that included robbery and sexual battery).	Yes
Zakrzewski, Edwards	*Zakrzewski v. State*, 866 So.2d 688, 690 (Fla. 2004) (defendant pled guilty to strangling his wife and killing their two children with a machete).	Yes

APPENDIX B:

FLORIDA DEATH ROW INMATES WITH FELONY MURDER CONVICTIONS WHO MAY NOT HAVE PHYSICALLY CAUSED A VICTIM'S DEATH

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?	If no, was the inmate's intention to kill premeditated?
Alston, Pressley	*Alston v. State*, 723 So.2d 148, 152-53 (Fla. 1998) (after defendant and his half-brother took their victim, James Lee Coon, to the woods at gunpoint, the defendant "'shot [Coon] twice in the head'"; defendant's half-brother also shot Coon after defendant told him "that 'the boy will have to be dealt with, meaning kill[ed],' because [Coon] could identify them").	Possibly	Yes
Chamberlain, John	*Chamberlin v. State*, 881 So.2d 1087, 1093 (Fla. 2004) (in the course of a robbery and three homicides, defendant "said 'no more witnesses and encouraged [his accomplice] to kill [Bryan] Harrison"; unsure whether their victims were dead, defendant subsequently "retrieved more bullets, and reloaded the gun," so that his accomplice could "again 'empt[y] the gun' into Harrison and [Harrison's girlfriend]").	No	Yes
Henyard, Richard	*Henyard v. State*, 689 So.2d 239, 242-43 (Fla. 1996) (defendant and an accomplice fatally shot two young girls after defendant raped and repeatedly shot their mother in the course of stealing their car; prior to his crime, defendant stated that he intended to "steal a car, kill the owner, and put the victim in the trunk").	Possibly	Yes

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?	If no, was the inmate's intention to kill premeditated?
Krawczuk, Anton	*Krawczuk v. State*, 634 So.2d 1070, 1071 (Fla. 1994) (although it is not clear whether it was defendant or his accomplice who more directly caused the death of David Staker, the record reflects that a "week before the murder, the pair decided to rob and kill Staker" and that defendant choked Staker and "twice poured drain cleaner and water into Staker's mouth").	Possibly	Yes
Lawrence, Gary	*Lawrence v. State*, 831 So.2d 121, 124-25 (Fla. 2002) (in the course of a robbery, defendant beat the victim, Michael Finken, with a pipe "until it bent" and then a baseball bat; although it appears that defendant's wife may have delivered the fatal blow with a knife, defendant told his stepdaughter prior to beating Finken that he and his wife intended to "knock off Mike").	No	Yes
Lugo, Daniel	*Lugo v. State*, 845 So.2d 74, 88, 114 (Fla. 2003) (in the course of an elaborate criminal enterprise, defendant injected one of his victims, Krisztina Furton, with horse tranquilizer and ordered his accomplice to continue to inject Furton with tranquilizer, thereby causing her death; the trial court found that the defendant "had a cold, calculated, and premeditated plan to kill [his] victims and dispose of their bodies").	No	Yes
Pearce, Faunce	*Pearce v. State*, 880 So.2d 561, 565-67 (Fla. 2004) (defendant and his accomplices kidnapped two boys and drove them to a remote location; defendant ordered one boy out of the car, and one of defendant's accomplices shot the boy in the head; defendant drove the car another 200 yards and ordered the second boy out of the car, and the same accomplice shot the second boy in the head; the trial court found that defendant's crime was "cold, calculated, and premeditated").	No	No

Florida Death Row Inmate	Description	Did the inmate physically cause a victim's death?	If no, was the inmate's intention to kill premeditated?
Stein, Steven	*Stein v. State*, 632 So.2d 1361, 1363 (Fla. 1994) (prior to shooting two Pizza Hut employees to death in the course of robbing the restaurant, defendant and his accomplice agreed "that there could be no witnesses to the robbery").	Possibly	Yes
Williams, Ronald	*Williams v. State*, 622 So.2d 456, 459 (Fla. 1993) (defendant, who ran a drug trafficking ring in Miami, ordered his accomplices "to 'drop' whoever was involved with the theft of his money and drugs").	No	Yes